Supreme Court, U.S.
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No. 97 –

In The

Supreme Court of the United States

October Term, 1997

SANFORD J. BERGER, et al,
Petitioners,

v.

SAMUEL R. PIERCE, et al,
Respondents.

On Petittion For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED

1. Can a U.S. District Court, and then a reviewing U.S. Circuit Court of Appeals, knowingly and deliberately ignore a cited, absolutely pertinent, non-controverted, and controlling decision of this Court that is the only existing authority on the legal question involved without violating Article III, Section 1 of the U.S. Constitution?

2. Can a U.S. Circuit Court of Appeals, without explanation, legitimately avoid the enforcement of its earlier mandate sent to a District Court, which ignores such mandate, when the aggrieved parties subsequently ask that same appellate court to enforce its prior mandate?

3. Can a U.S. Circuit Court of Appeals, without explanation or discussion, legitimately adopt two legally challenged Opinions of a District Court as its own Opinion when the appellants have presented seven unaddressed Issues and cited Argument as to why those two District Court Opinions were legally erroneous and deficient?

4. When an insured claims that in 1987 he incurred a total loss to his home, insured under the National Flood Insurance Program (NFIP), and eight (8) days after his claimed loss a NFIP adjuster agrees that a total loss exists but payment is denied on the basis of a NFIP policy Exclusion later found to be "contrary to law" by a U.S. Circuit Court of Appeals, can the NFIP agency thereafter revisit the restored property six (6) years later in 1993 and legally raise the surprise defense, without ever having filed an Answer, that there could not have been a total loss in 1987 as the property was intact in 1993?

5. When it is subsequently determined by a U.S. Circuit Court of Appeals that the federal government has wrongfully taken and used, or

unjustifiably withheld and used, monies of a citizen, can Prejudgment Interest be awarded on the bases of: (1) Unjust Enrichment, or (2) Disgorgement, in addition to the commercial activity doctrine, irrespective of federal sovereign immunity?

6. By virtue of the provisions of the Equal Access To Justice Act (EAJA), 28 U.S.C. Sec. 2412(b) and 28 U.S.C. Sec. 2412(d)(1)(A), and based upon the Appendix hereto and the facts that will follow, were these petitioners entitled to an award of attorney fees?

7. Charged with the responsibility of policing the federal court system by this Court's Rule 10 (a) can this Court refuse to exercise its' supervisory powers over lower federal courts that purposely ignore cited decisions of this Court, their own precedential decisions and mandates to a district court, and all without justifiable reason or explanation?

Included Subsidiary Question:

Are 28 U.S.C. Sec. 372(c)(3)(A) and corresponding Sixth Circuit Court of Appeals Judicial Misconduct Rule 1(b), pertaining to the disciplining of federal judges, an unconstitutional enigma violative of the "good Behaviour" requirement of Article III, Section 1 of the U.S. Constitution in that they license federal judges to knowingly cross the decisional bridge between right and wrong, and thereby engage in conduct other than "good Behaviour," so long as such conduct occurs on the bench?

PARTIES

From the outset of these proceedings in 1988, the plaintiffs have been Sanford J. Berger, Lulu Wills, Philip and Eleanor Rees, and Gerrit Joosten.

The sole remaining defendant in the court

below is the Federal Insurance Administrator (FIA).

Although originally captioned Sanford J. Berger, et al. v. Samuel R. Pierce, Jr., et al., the caption was mysteriously changed to Sanford J. Berger, et al. v. Andrew Cuomo, et al., in the 11/10/97 Memorandum Opinion and 1/2/98 Order of the Sixth Circuit.

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Supreme Court of the United States

October Term, 1997

SANFORD J. BERGER, et al.

Petitioners

- vs -

SAMUEL R. PIERCE, Jr., et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Memorandum Opinion of the U.S. Court of Appeals for the Sixth Circuit was filed on November 10, 1997. (A35-36)

The first appealed Opinion of the district court was filed on November 16, 1994 (A20-28), but was not dispositive of all claims, while the second appealed Opinion of the district court was filed on August 8, 1996. (A29-34).

JURISDICTION

Petitioners' timely Petition For Rehearing With Suggestions For Rehearing En Banc was denied on January 28, 1998. (A37)

This Court has jurisdiction pursuant to the provisions of 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Article III, Sec. 1, U.S. Constitution. (A38)

28 U.S.C. Sec. 372(c)(3)(A) (A38)

28 U.S.C. Sec. 2412(b) (A39)

28 U.S.C. Sec. 2412(d)(1)(A) *(A39)*

Rule 10(a), U.S. Supreme Court *(A39)*

Judicial Misconduct Rule 1(b)
Sixth Circuit Court of Appeals *(A38)*

STATEMENT OF THE CASE

These five petitioners were owners of littoral properties on Lake Erie, which properties were all insured in 1987 under the NFIP. In early 1987 (when 3 of the 4 properties had been condemned as uninhabitable by Willoughby, Ohio, and the fourth was on the brink of falling into Lake Erie), they filed loss claims with the servicing agent for the NFIP (a New York Stock Exchange company called Computer Science Corp. (CSC). CSC then retained a local adjusting firm whose adjusters viewed the properties in close proximity to the time of the claimed losses. After conferring with CSC, the adjusters, in denying all four claims solely on the basis of the Standard Flood Insurance Policy (SFIP) Exclusion of "gradual erosion," wrote the following on their Adjustment Reports :

> *Per your company's instructions, I am closing my file recommending that no payment be made for this claim due to the fact that it was caused by erosion over a period of time. (Emphasis)*

Concurrent therewith, their abutting neighbor's loss claim was also denied on the basis of "gradual erosion," but he was then paid in late 1987 when a Congressman intervened on his behalf despite a SFIP provision and a federal regulation stating that payment would only be made if the affected area's damage covered more than 2 acres and the neighbor only had ¼ acre. The first example of "Bad Faith."

The second display of "Bad Faith" occurred when the adjusters, in their written reports agreed that all of the five petitioners had total losses and qualified for "Replacement Cost" coverage (face amount of each policy) and then proceeded to adjust each claim on the basis of "Actual Cash Value" (a depreciated amount) so that each of the naive petitioners were to receive $7,000 - $41,500 less than they were legally entitled to under their SFIP policies. The third display of "Bad Faith" occurred when the adjusters, after viewing each property less than one hour, determined that the collapse of the supporting cliff was due to "gradual erosion," when, in fact, neither CSC or the adjusters had any possible way of knowing how fast or slow the cliff had eroded prior to their arrival.

Petitioners then brought suit in the U.S. District Court pursuant to the terms of their SFIP and 42 U.S.C. Sec. 4072 (allowing suit against the federal government). Losing therein on motions, they then successfully appealed to the Sixth Circuit resulting in the decision of Berger, et al. v. Pierce, et al., 933 F.2d 392 (CA6,1991). (A1-13). ("Berger I"). Berger I set the precedent that all a NFIP loss claimant need establish was that, at the time of his/her loss, the involved body of water was exceeding its anticipated cyclical level, that there need not be an accompanying unusual event as claimed by the FIA, and that the "gradual erosion" Exclusion was contrary to the intent of Congress in amending the NFIP legislation. See A12.

Berger I further said at A13:

> *The administrative "gradual erosion" exception, whatever its applicability in other circumstances, cannot contravene Congress' express intent to compensate claimants under the circumstances alleged by plaintiffs.*

Upon remand, and at trial, the FIA took the

forbidden position that not only must the body of water be exceeding its anticipated cyclical level BUT ADDITIONALLY there must have been a sudden, unexpected and unusual accompanying force of nature. Among the many Exhibits at trial were letters from the FIA to 52 federal legislators and Ohio's governer stating that NFIP policyholders were being paid under identical circumstances because a legal state of "flood" was acknowledged. The 11/10/97 Memorandum Opinion herein, at A35, used those letters as the only example of "Bad Faith" that would not justify an award of attorney fees, but neglects to acknowledge the above purpose of the letters.

Again losing, by virtue of this fourth display of "Bad Faith," the petitioners were once again forced to successfully appeal to the Sixth Circuit, resulting in the decision of Berger, et al. v. Pierce, et al., Unreported Case No. 91-3982 (CA6,1992). (A13-19). ("Berger II").

Berger II was also precedential in that the Sixth Circuit decreed that: (1) That the U.S. Army Corp's Monthly Bulletin of Lake Levels for the Great Lakes was the benchmark for determining when any of the Great Lakes were "exceeding anticipated cyclical levels" (A16-19 and A16 n.2); (2) The FIA was admonished for taking a position in the preceding trial that was "contrary to the law of the case" as set down in Berger I, (A15-16); (3) That the "gradual erosion" Exclusion was contrary to law, (A19); (4) That in the 19 years since the NFIP was amended, the term "anticipated cyclical levels" was now defined for the first time, (A18), and most importantly, (5) The district court was ordered to enter declaratory judgments for all the petitioners that would compensate them in accordance with the terms of their NFIP policies. (A19).

Inasmuch as the petitioners had become "prevailing parties" by obtaining the relief they

had originally sought for their class of NFIP policyholders plus an order that they were all to be paid plus altering the position between the FIA and the petitioners, Berger II addressed their Brief's presented ISSUE of the district court's denial of attorney fees by stating: "The district court also is directed to reconsider the policyhold[illegible]s' request for attorney fees, in light of our decision today." (A19). [Note. Because of the foregoing].

The decision in Berger II was filed on 12/22/92, but it was not until late 1993 that the FIA made its first offer to pay each petitioner, excepting Berger, the face amount of each of their policies on condition they waive their claims for Prejudgment Interest. Wills, due to her poverty, age and health, accepted the offer on 10/27/93, but the Rees's and Joosten declined. Eventually, the FIA paid the Rees's and Joosten on 4/21/94 without their waiver of Prejudgment Interest, but still refused to pay Berger despite the Berger II mandate that all the policyholders be paid. The fifth example of "Bad Faith."

It was then on 11/16/94, after the fact, that the district court entered moot declaratory judgments for all of the plaintiffs, but refused to make a determination of any sum certain owing to Berger, in violation of the Berger II order.

After the remand of Berger II on 12/22/92, the petitioners languished in district court for 5 years while losing every legal issue arising. For example, petitioners' counsel lost on their request to have their contingent fee of 33% of the amounts paid to Wills, the Rees's, and Joosten determined to be reasonable, lost on their request that the FIA not be allowed to raise a first-time surprise defense at a 1995 hearing in light of the fact that the FIA never filed an Answer since the filing of the Complaint

in 1988, and lost on their FRCP 58 motion requesting that the district court file judgments or orders to permit an appeal pursuant to FRAP 3(c).

Note that in denying Berger's loss claim on 5/21/87, the sole reason for denying the claim was the "gradual erosion" Exclusion, which was declared contrary to law in both Berger I and Berger II. In fact, these were the exact words used by the FIA adjuster on his 5/21/87 Report:

> *Per your company's instructions I am closing my file recommending that no payment be made for this claim due to the fact that it was caused by erosion over a period of time.*

Although Berger II had ordered the district court to implement the payment to Berger of the amount he was insured for under his NFIP policy, the district court disobeyed that mandate on the basis of the following circumstances:

Berger claimed a total loss existed to his insured home as of 5/13/87, being fully aware at the time that a false statement was a violation of federal criminal law. On 5/21/87, the FIA's adjuster's Preliminary and Final Reports, introduced into evidence, agreed that there was a total loss to the property at that time. As such, during May, 1987, there were only two eyewitnesses who knew whether the property was, or was not, a total loss, and both knew that erosion only gets worse and never gets better. Note from above that it was CSC (who never viewed the property), not the adjuster, who made the decision not to pay the claim (a federal agency is not a "company").

During June, 1988, and although the NW corner of the home was now unsupported and fracturing, Berger took a gamble by having a breakwall built to slow down further erosion, and then in June, 1989, Berger contracted for and built a retaining wall. Thereafter, he had

hundreds of tons of fill brought in, stabilized the foundation support of the NW corner, and repaired the cracked interior walls and misaaligned door jam -- all at great expense.

At Berger's deposition in early 1993, he admitted the home still temporarily stood, but that the breakwall and retaining wall were now breaking up due to wave action.

On July 13, 1993, the FIA filed its motion to allow their adjuster to inspect the home, which motion was opposed by Berger on the basis of an 1807 decision of this Court (which is the only authority on the legal issue that was involved, and will be discussed in depth, infra), the Berger II mandate, and the fact that the FIA had never filed an Answer and could not raise a new defense at that time. Without there being any opposition to Berger's legal authority by the FIA, nevertheless the district court granted the FIA motion to inspect, which inspection was later performed by a CSC employee.

Knowing that the legal authority of this Court did not justify such an inspection was the sixth example of "Bad Faith" by the FIA.

On April 4, 1994, the magistrate judge wrote this in her Report and Recommendation!!

> *The Sweeney final report states that the 'Insured qualifies for R/C coverage.' It further states that the 'duration the building will not be habitable' is 'more than 2 months.' This is the report made closest to the date of the claim. The reports of the reinspection in 1988 and the inspection by Mr. Allen in 1993 cannot be used as substitutes for that earlier report. (Emphasis)*

Disregarding that Report, the district court set a hearing for April 4, 1995, and Berger raised the same objections he raised relative to the prior inspection, but to no avail.

The essence of the hearing regarding Berger's damages was that the FIA took the position that if the home was intact in 1993, then it had to be intact in May, 1987. Berger's expert witness testified that it is the practice in the insurance industry that an adjustment can only be reliable if made in close proximity to the time of the claimed loss, as too many possible intervening events might occur thereafter which would make a tardy adjustment unreliable and inaccurate, and that the involved SFIP policy provided that the insured must give written notice to the FIA of a loss within 60 days. Why? Because an insurer is prejudiced by not being able to conduct a timely investigation, interview witnesses, evaluate the existant loss and try to negotiate a settlement, and that non-comliance by an insured is an absolute defense for an insurer.

In its 8/8/96 Opinion, the district court found that Berger was not entitled to any damages for his claimed May, 1987 loss. (A29-34).

Then back to the Sixth Circuit a third time. In petitioners' 47 page Brief therein, there were 65 pertinent cases cited and the Standard Of Review in that court is that the law is to be reviewed de novo. The 11/10/97 Memorandum Opinion of the Sixth Circuit, (A35-36), consists of 1½ pages and discloses that was never done, and is politely referred to in lawyers' circles as a "Bum's Rush" Opinion.

In their timely Petition For Rehearing En Banc, petitioners cited 12 controlling Sixth Circuit decisions plus 18 decisions of this Court and a pertinent previously cited decision written by the presiding panel judge while sitting in the Ninth Circuit, but all to no avail. (A37).

In summary, there is no possible way these petitioners could have lost in the district court and the Sixth Circuit if the cited precedents of the Sixth Circuit and this Court had been

respected and followed, rather than ignored; and with respect to Berger's damage claim, how a district court could be bold enough to disregard a Circuit Court mandate and a controlling decision of this Court, and why a Circuit Court would not enforce its prior mandate, remains a mystery.

ARGUMENT

Preface

When you play poker and hold a royal flush and the dealer tells you that you lose to a pair of two's, you know there is something amiss.

When you're at bat and the pitcher wildly throws the ball into the stands and the umpire calls it a strike, you know there is foul play astir.

So too, when you've practice law for 45 years and your cited controlling precedents are either unopposed or ignored; and when you consistently lose every legal issue in a five year period in a federal district court, and when the estimated 16 members of the Sixth Circuit Court of Appeals refuse to recognize the authority of a decision of this Court, their own precedents or enforce their very own prior mandate, then one can't help but suspect that there is some unknown influence afoot.

In counsel's very first effort at filing a civil rights lawsuit, this writer and his former associate were sua sponte dismissed out in 6 days. In our following first appeal to the Sixth Circuit of that dismissal, that court rendered us a favorable decision in Loudermill v. Cleveland Board of Education, 721 F.2d 550 (CA6,1983); and subsequently, this Court gave us a favorable decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

All told since then, we have filed an estimated 16 Petitions for a Writ of Certiorari with

this Court and an estimated 30 appeals to the Sixth Circuit, at our own expense, which isn't bad for a two-man office with no secretarial help. The great majority of those cases involved civil rights violations, but only two of them ever saw the inside of a courtroom. In fact, we lay claim to the unofficial national record for getting into and out of a U.S. district court in the shortest possible time. We had filed a civil rights lawsuit on a Monday near 4:00 P.M. On Tuesday, the assigned judge's secretary called to let us know we had to be in his chambers at 8:00 A.M. Wednesday morning. On Wednesday morning we were told by the judge that either we voluntarily dismiss the suit or he would impose severe sanctions against us. Terrorized, we dismissed. In and out in 40 hours. It did not end there, but that's another story.

From this history of appeals, we have learned two things: (1) Never file a civil rights lawsuit, and (2) Never, ever, bring a lawsuit against government and/or a governmental employee.

However, the plus side is that we got to read a lot of Opinions (aside from Opinions wherein we were not involved); and came to understand the difference between published and unpublished Opinions. Published Opinions were intellectual, scholarly, well-reasoned and many times profound (and totally acceptable even when we lost), whereas unpublished Opinions were oft-time lacking and totally unresponsive to the law and facts before the appellate panel.

Never before have we made this request, but the two Opinions of the district court, (A20-28 and A29-34), and their approval by the Sixth Circuit's abbreviated Opinion, (A35-36), are so lacking in credibility as to call out for the supervisory enforcement by this Court of its' Rule 10(a).

Recently, our local Daily Legal News related the response of the president of the American Bar Association to House Republican Whip Tom DeLay's floor remarks criticizing unidentified federal judges who do not "uphold the Constitution." Query. Why should a Congressman even have to be talking about the conduct of federal judges?

The sparse Sixth Circuit Opinion herein, (A35-36), which obviously did not comply with the Standard of Review in that Court that the law is to be reviewed de novo, will be counsel's last appearance in the Sixth Circuit, as even little children will tell you that it's no fun to play with someone who plays unfair.

The touchstone of all that happened in the district court is best exemplified by a discussion of Question 4, supra, initially.

When the FIA moved to inspect Berger's home on 7/13/93, p.7 supra, the question of law regarding the illegality of such a request seemed to be obvious, but finding legal authority supporting such illegality proved to be an almost impossible task.

The question to be resolved was this: At what point in time are property damages to be conclusively determined -- at or in close proximity to the date and time of the claimed loss OR can the damages be determined by an observation made years after the date and time of the claimed loss?

A thorough search of current legal digests and encyclopedias proved fruitless. Then, a paid computer check of Lexis and WestLaw turned up nothing. Thereafter, and totally frustrated, this writer happened to look up from his desk at a bookshelf of lawbooks that were antiquated in 1952 when he first opened his office, and were purchased for a few dollars as filler for

empty bookshelves. Those books were Ruling Case Law, and contained the following law that was first cited to the district court on 7/16/93; repeatedly cited thereafter, and then cited in the Sixth Circuit. Significantly, the FIA has never cited any law, at any time, on this legal question, so that the district court's denial of Berger's claim was contrary to the only law cited.

The only known law regarding total loss determination was set forth in the decision by this Court in Rhinelander v. Pennsylvania Ins. Co., 4 Cranch 29, 2 U.S. (L.ed.) 540 (1807). In Rhinelander, an American ship was captured by the British as a prize of war on 2/10/1805. Thereafter, on 7/8/1805, the ship and its cargo were unexpectedly returned to its owner, and the issue was whether there was a total loss on 2/10/1805. Writing the Opinion for this Court, Chief Justice John Marshall had this to say in determining a total loss existed on 2/10/1805:

> *A majority of the judges are of the opinion that the state of loss at the time of the abandonment must fix the rights of the parties to recover on an action afterward brought .... (Emphasis)*

This federal principle of insurance law is so well established that when Rhinelander is Shepardized, there are only a few supportive cases by this Court, dating in the 1800's, that cite Rhinelander.

In Hall v. Ocean Ins. Co., 37 F. 371 (1889), a ship ran aground on rocks that were puncturing its hull, and it was concluded that she was a goner and abandoned. Later on, the ship was surprisingly salvaged, repaired and saved. Again, the issue as to whether it was a total loss when abandoned was before the court, and holding that it was a total loss when abandoned, this was said:

> *The perils of the ship cannot be measured by the ultimate results to save her. I am to*

look to the danger in which she was, rather than to the damage she received.

In the same light, the FIA in moving for an inspection on 7/13/93 and at the 4/4/95 hearing took the unfounded position that if the property was not a total loss in 1993, then it could not have been a total loss in 1987 despite their own adjuster's previous 1987 determination that it was a total loss. In opposing the 1993 inspection by affidavit and then by testimony at the 1995 hearing, Berger's expert witness, a public insurance adjuster, claimed that it is the accepted practice in the insurance industry that only the adjustment made in close proximity to the time of the claimed loss is acceptable, as too many intervening events might occur thereafter which would make a tardy adjustment unreliable and inaccurate.

For example, in Earnmoor S.S. Co. v. Union Ins. Co., 44 F. 374 (USDC,NY,1890), the insurance company tried to make a tardy adjustment retroactive, and it was held that the first adjustment, made in close proximity in time to the loss, was "prima facie evidence of the correctness of the items it contains." Continuing, the court added:

> I must decline to enter anew upon the details of the adjustment which was approved by respondent's agent, acquiesced in by them, and not brought forward until after the decision in this case.

To the same conclusion, see International Navigation Co. v. Sea Ins. Co., 124 F. 93, aff'd 129 F.13, 63 C.C.A. 663 (1903), holding that since the insurer relied upon its adjuster, the initial determination of the adjuster was conclusive on the insurer.

To reverse the logic of the legal principle, the SFIP (as all insurance policies) provides

that the insured must give written notice of a loss within 60 days. Why? Because an insurer is prejudiced by not being able to conduct a timely investigation, interview witnesses, evaluate the existant loss and try to make a settlement. Non-compliance by an insured is an absolute defense for an insurer.

The legal imperative of Rhinelander goes into the teeth of the adage that: "You can't have your cake and eat it too!" but the obvious reason there is no legal authority to the contrary is because it would mean that damaged property could never be repaired, restored or replaced during the life of any insurance dispute and/or litigation.

Despite this Court's unchallenged resolution of the involved question in 1807, despite the Berger II mandate, despite the Magistrate Judge's 4/4/95 Report and Recommendation, despite the failure of the FIA to ever file an Answer and raising surprise defenses whenever they pleased, and despite repeated briefing and objection by Berger, the district court inexcusably managed to determine that Berger was not entitled to any damages under his SFIP; and the Sixth Circuit, being fully apprised of the same law and facts, put its' stamp of approval on the district court's actions.

Either the lower federal courts have to respect and abide by a decision of this Court or all lawyers will have to devise a new way to practice law as the rules of the game must have been secretly changed.

This legal issue is unique in that there is one, and only one, pertinent and controlling decision by this Court that gives the answer to Question 4, and that is the Rhinelander decision.

Inasmuch as the Sixth Circuit "[has] so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower federal court," by know-

ingly ignoring a decision of this Court, there can be no legitimate reason excusing a "[call] for an exercise of this Court's supervisory power." Rule 10(a). (A39).

The preceding discussion has also addressed Question 1, Question 2, and Question 7.

With respect to Question 3, the following is a duplication of the STANDARD OF REVIEW found in these petitioners' Brief in the Sixth Circuit.

STANDARD OF REVIEW

Attorney Fees Issues 1-4:

These Issues are to be reviewed under an abuse of discretion standard. Findings of Fact are to be accepted as true unless clearly erroneous, while legal conclusions are to be reviewed de novo. Perkert v. Secretary, HHS, 905 F.2d 129,132 (CA6,1990) and Jankovich v. Bowen, 868 F.2d 867,869 (CA6,1989).

Prejudgment Interest/Disgorgement Issues 5-6:

The district court's application of the law is to be reviewed de novo, Collyer v. Daring, 98 F.3d 211,219 (CA6,1996), while Findings of Fact are to be upheld unless found to be clearly erroneous by virtue of FRCP 52.

Plaintiff Berger's Claim Issue 7:

The district court's application of the law is to be reviewed de novo by this Court. Collyer v. Daring, supra. Findings of Fact are to be upheld unless found to be clearly erroneous. FRCP 52. Herein, the district court's decision was totally contrary to a U.S. Supreme Court decision and other cited federal law, which was the only law cited to the district court, and that court's decision was based upon evidence, over objections, that should not have been admitted or considered.

Clearly, by what has already been said and

what will follow, the hearing panel's Opinion, (A35-36) and the en banc Order, (A37), didn't even come close to complying with their own Standard of Review.

Note that the panel's Opinion solely relies on the district court's 11/16/94 and 8/8/96 Opinions. (A20-28) and (A29-34). However, the seven presented and unaddressed Issues had argued the shortcomings and errors of the two district court Opinions -- which necessitated a review and discussion of those Issues, but that is not to be found in the panel's Opinion.

To illustrate the shortcomings of the panel's Opinion, a discussion of Question 6 will prove to be helpful, and that deals with the question of an award of attorney fees under the EAJA.

In Berger II, the issue of attorney fees was presented to that panel, and the response of that panel strongly inferred that attorney fees should be awarded. See p.5 hereof, supra.

The EAJA, 28 U.S.C. Sec. 2412(b), permits a discretionary award of attorney fees if the plaintiff has been the "prevailing party" and there has been "bad faith" OR a "common fund" OR a "common benefit." For an excellent discussion of the EAJA, look to Lyden v. Howerton, 731 F. Supp. 1545 (SD,Fla,1994). (A39).

These petitioners were "prevailing parties." See pp.4-5, supra. In the preceding Statment Of The Case, they gave six examples of "Bad Faith" on the part of the FIA. The "common fund" was the pool of premiums paid by all NFIP policyholders, and the "common benefit" was that the "gradual erosion" Exclusion was no longer available to the FIA to defeat a policyholders legitimate claim. As to a benefitted "ascertainable class," the Magistrate Judge had identified them thusly:

> This leaves to potential plaintiffs within the Sixth Circuit the option of pursuing claims

based upon Sixth Circuit law established in this case and to plaintiffs outside of the Sixth Circuit the option of arguing the Sixth Circuit law in their circuits ...

That identical situation existed in Loudermill v. Cleveland Board of Education, 844 F.2d 304, 312-313 (CA6,1988), wherein it was held that even though Loudermill did not obtain any relief on his individual claim for damages (but 4 of the 5 petitioners herein did obtain relief), and did not obtain class action certification or declaratory or injunctive relief; nevertheless, he did, in effect, obtain the relief originally requested for the proposed class. Not unlike the class of all NFIP policyholders herein, the members of the propsed class in Loudermill still have to press their individual claims for monetary damages, but by virtue of Berger I and Berger II, the relationship between all NFIP policyholders and the FIA has been altered and clarity had been given to the law that affected the relationship between government and private citizens. In Loudermill III above, an award of attorney fees by the district court was affirmed by the Sixth Circuit.

The Congressional goals of the NFIP was to give protection to riparian and littoral property owners, as well as the United States, against flood damage resulting in "[p]ersonal hardships and economic distress which have required unforseen disaster relief measures and have placed an increasing burden on the nation's resources." Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025,1033 (CA,DC,1978), aff'd 598 F.2d 311 (CA,DC), cert. den'd 444 U.S. 927 (1979), and quoting from the NFIP Act. (Emphasis)

The concept of the EAJA rests on the premise that a party who chooses to litigate an issue against the federal government is not only representing his/her own vested interests, but

is also refining and formulating public policy. Commissioner I.N.S. v. Jean, 496 U.S. 154 (1990).

In contrast to the discretionary circumstances for an award of attorney fees under the EAJA, a party is entitled to a mandatory award of attorney fees, pursuant to the provisions of 28 U.S.C. Sec. 2412(d)(1)(A), (A39), if such party is: (1) a prevailing party; (2) the position of the United States was not "substantially justified," and (3) there are no circumstances that would make an award of attorney fees unjust. Perkert v. Secretary, HHS, 905 F.2d 129,132 (CA6,1990). The FIA has never argued that these petitioners were not prevailing parties or that an award of attorney fees would be unjust. As such, only the question as to whether the position of the FIA, since 1987, was "substantially justified" remains. In Lyden v. Howerton, supra, when distilled, said that if there had been "Bad Faith," then that translates into a position that was "substantially unjustified."

Nor can it be argued that these petitioners did not succeed on a significant issue involved in this litigation so as not to qualify as "prevailing parties." Kelly v. Secretary, U.S. Department of Housing, 97 F.3d 118,121 (CA6, 1996).

Moreover, an award of attorney fees is appropriate when unjustifiable agency action forces litigation, Commissioner I.N.S. v. Jean, p.159 n.7, supra, which these petitioners have hopefully shown was the situation in this case.

Further, to be "substantially justified," the government's position must be justified to a degree that could satisfy a reasonable person; i.e., it must be justified, both in law and fact, to a degree that could satisfy a reasonable person. Jankovich v. Bowen, 868 F.2d 867,869 (CA6,1989), citing Pierce v. Underwood, 487 U.S. 552 (1988).

In its Opinion herein, at A35, only one reference is made to "Bad Faith," and that was the two 1986 letters to 52 members of Congress and Ohio's governor. But, these are excerpts from those letters, which had been introduced into evidence, that were glossed over.

The first FIA letter, dated 3/21/86, and sent by the FIA to 52 members of Congress said:

> *[we] believe that the Great Lakes, with the possible exception of Lake Ontario, are now experiencing water levels 'exceeding anticipated cyclical levels,' as that phrase is used in section 1370(c). Thus, a condition of flooding, as contemplated by the statutory language, generally exists along the Great Lakes and NFIP losses will be investigated and adjusted in the light of that determination. (Emphasis)*
>
> *After a review of data from the U.S. Army Corps of Engineers, we believe that ... the situation ... is one in which the lake levels, ... are, ... 'exceeding anticipated cyclical levels,' ... (Emphasis)*

One would be justified in assuming that 52 responses had to be sent to 52 members of Congress because 52 members of Congress were complaining to the FIA about the way the NFIP was being administered.

Next, the 4/18/86 letter from the FIA to then Governor Celeste had this to say:

> *As we stated in our March 21, 1986 letter, we believe that, generally the Great Lakes, with the possible exception of Lake Ontario, are now experiencing water levels 'exceeding anticipated cyclical levels.' The NFIP servicing contractor has received fifty-nine claims arising out of the storms in early December, 1985. Twenty of these have been concluded and not one case has been denied on the*

ground that the loss was caused by ordinary erosion. (Emphasis)

WOW! Consequently, when the FIA denied the loss claims of these petitioners in early 1987, on the basis of ordinary erosion and under the same lake conditions that existed in March, 1986, that was just another example of demonstrated "Bad Faith."

The court, in Spencer v. N.L.R.B., 712 F.2d 539,561 (CA,DC,1983), zeroed in on the dilemna and frustration these petitioners have experienced when it said that a problem frequently cited by the Congressional proponents of the EAJA was the capacity of the government, with impunity, to "single out" particular private parties for disparate treatment, as too often the government adopts a general policy in dealing with cases of a given variety, but takes a different position (inexplicably or maliciously) in one or a few other cases.

Yes, there was mumbo-jumbo gobbledygook in the two 1986 letters sent by the FIA, but the excerpts above are clear and unequivocal and contradict what the Sixth Circuit panel said in its Opinion at A35.

Now, on to Question 5, the Prejudgment Interest question. Initially, note on p.19 hereof, supra, that in his 4/18/86 letter to Governor Celeste, the FIA states that: "The NFIP servicing contractor has received fifty-nine claims arising out of the storms in early December, 1985." That's important, as the evidence introduced at a prior trial was that the servicing agent was Computer Science Corp. (CSC), and excerpts from their Annual Reports, also previously introduced into evidence, will be discussed, infra.

The "no interest rule" (that the United States is not liable for interest unless it is expressly authorized by statute or contract) is

not applicable "[w]here the Government has cast off the cloak of sovereignty and assumed the status of a private enterprise." Library of Congress v. Shaw, 478 U.S. 310,317 n.5 (1986). As will be amptly demonstrated, infra, the NFIP has been operated in the same manner as a private property casualty insurance company would have operated.

None of these 5 petitioners were paid in 1987, while other NFIP claimants who were paid in 1986 and 1987 (FIA letters and abutting neighbor, supra) had the use of those insurance proceeds to invest OR buy new homes. Four of the five petitioners had their homes fall over a cliff, so non-payment meant they had to obtain makeshift shelter elsewhere while continuing to pay on mortgages for non-existant homes. Having no equity plus existant mortgages made them poor credit risks. When these four were finally paid in 1993 and 1994, they only received two-thirds of the proceeds as the other one-third went for attorney fees. So, the government had the use of all the petitioners' money since 1987 and "[did] not need to borrow an equivalent amount from outside sources." Presiding panel Judge Boggs' Opinion, while sitting in the Ninth Circuit, in United States v. $277,000 Currency, 69 F.3d 1491 (CA9,1995).

It was never a situation where a dole was asked for from the U.S. Treasury. Rather, it was a request for the return of the interest they would have received if they had received the money legally due them in 1987 and had invested it privately OR not been forced to pay double interest on two mortgages.

Standard Oil Co. v. U.S., 267 U.S. 76,79 (1925), in justifying the federal government paying interest, had this to say:

> *When the United States went into the insurance business, issued policies in familiar form*

and provided in cases of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business. (Emphasis)

And, one of the incidents of suits is the payment of prejudgment interest if it is determined that insurance proceeds were wrongfully withheld.

Prejudgment interest is payable if the government engages in private commercial activity versus governmental sovereign activity, and these are the evidentiary facts that were before the district court and the Sixth Circuit:

1. The NFIP Act provides for a Plan A and a Plan B. Under Plan A, the federal government underwrites and manages the whole Program using the SFIP, while under Plan B, pooled private insurance companies underwrite, manage and use the same SFIP (as under Plan A) that issue from each private insurance company. So, if Plan B had been in effect in 1987, these petitioners would have had to sue private insurance companies instead of the U.S. government.

2. The FIA, through its servicing agent, CSC, a New York Stock Exchange company, solicits NFIP customers through TV ads and other media ads under Plan A, while the pooled private insurance companies do the same thing when Plan B is in effect. As of now, Plan B is in effect, and precisely how and why the federal government ping-pongs between the two plans is unknown.

3. An NFIP policy can only be purchased from a private insurance agent who is paid a commission initially and upon renewal.

4. Loss adjustments are made by paid private insurance adjusters.

5. CSC admits in its Annual Reports it performs "[all] of the policy, claims marketting and administrative functions of a property casualty

company ..." For example:

From page 15 of the 1986 CSC Annual Report[11]:

> The division acts as servicing agent for the federal government's National Flood Insurance Program, operating one of the largest property insurance programs in the nation at its Lanham, Maryland facility. The unit performs 'all' of the policy, claims, marketing and administrative functions of an insurance company, with the government assuming the underwriting risk. This federal program provides over two million property owners in flood-prone areas with insurance coverage totalling$135 billion. (Emphasis)

From page 10 of the 1987 CSC Annual Report:

> And for the Federal Emergency Management Agency, we act as servicing agent for the National Flood Insurance Program, a role that includes 'all' of the policy, claims, marketing and administrative functions of a property casualty company, with the federal government assuming the underwriting risk of $153 billion of insurance coverage. (Emphasis)

Plain and simple, that is private commercial activity, not governmental sovereign activity, allowing the payment of prejudgment interest. McDermott International, Inc. v. Wilander, 498 U.S. 337,342 (1991); Lynch v. U.S., 292 U.S. 571,581 (1933); Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992); Saudi Arabia v. Nelson, 507 U.S. 349 (1993); Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682,696 (1976); New York v. U.S., 326 U.S. 572,579 (1946)(Frankfurter, J.); Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 387, 388 (1939); R.F.C. v. Menihan Corp., 312 U.S. 81,83 (1941); West Virginia v. U.S., 479 U.S.

305,310 n.2 (1987); Loeffler v. Frank, 486 U.S. 549,555 (1988); FDIC v. Meyer, ___U.S.___, 114 S.Ct. 996 (1994) and Miller v. Robertson, 286 U.S. 243,257 (1924).

The district court denied the petitioners' Request For Prejudgment Interest solely on the basis of Sandia Oil Co. v. Beckton, 889 F.2d 258 (CA10,1989), which relied on U.S. v. Worley 281 U.S. 339 (1930). Worley distinguished the 1925 case of Standard Oil Co. v. U.S., supra, but the insurance schemes in those two cases were entirely different. It was then in the Sixth Circuit's 1977 decision in Bituminous Coal Casualty Co. v. Lynn, 503 F.2d 636,644-5 (CA6, 1977) that this Court's decisions in Standard Oil and Worley were examined, and Bituminous held that the legal principle of Standard Oil remained undisturbed even after the Worley decision. As such, the cited Bituminous decision should have been controlling in the Sixth Circuit, as the facts in Bituminous, relying on FHA v. Burr, 309 U.S. 242,245 (1940), nearly mirror the facts herein. Yet, Bituminous was ignored.

Another legal theory advanced to the Sixth Circuit was that of "unjust enrichment," as exemplified by their decisions in Tiemeyer v. Community Mutual Ins. Co., 8 F.3d 1094,1102 (CA6,1993)(panelist Judge Keith also on that panel); Drennan v. General Motors Corp., 977 F.2d 246,253 (CA6,1992) and Sweet v. Consolidated Aluminum Corp., 913 F.2d 268,271 (CA6, 1992). Although the federal government was not involved in those decisions, the logic of the reasoning was that the Sixth Circuit felt strongly about the awarding of prejudgment interest under circumstances that were not even as clear cut as the facts involved in this litigation wherein perpetual litigation for more than 10 years, with resultant delay, has been the modus operandi of the FIA.

Still another precedential and innovative legal theory is that of "Disgorgement," as advanced by Judge Boggs in his Ninth Circuit Opinion in U.S. v. $277,000 Currency, p.21 herein, supra, which was cited and relied upon in our Sixth Circuit Brief prior to discovering that Judge Boggs would be sitting on our panel. To quote therefrom:

> *This case involves an important issue, one which undoubtedly occurs with some regularity, and yet one that appears to remain a question of first impression, at least so far as a complete examination is concerned.*

Therein, Judge Boggs, in approving of the payment of prejudgment interest by the federal government, discussed in depth the benefit to the federal government in unjustifiably retaining private monies and not having "[to] borrow from the outside world," and by way of illustration stated that the government could not seize a pregnant cow, and if it was ultimately found not to be entitled to the cow after the cow had given birth, the government could not ultimately return the now-barren cow, but retain the calf OR "[the] government will not be allowed to retain the fruits, once the tree has been ordered returned to its owner."

Why Judge Boggs could write such a profound and scholarly Opinion, involving a "complete examination," to protect the rights of someone accused of criminal activity and then totally disregard his cited Opinion with respect to these petitioners, who were victims of repeated governmental abuse and likewise entitled to a "complete examination" Opinion, is a question that only he knows the answer to.

The Subsidiary Question is a rhetorical question, but one wonders why the words "good Behaviour," Article III Section 1 of the U.S. Constitution (A38), only appear with respect to

the judicial branch of the federal government, and not the legislative or executive branches in the U.S. Constitution. Regretably, counsel has not had the time or inclination to search out an answer, if indeed there is an answer.

What little is known, howeverm is that all judges, state or federal, take an oath of office and an oath is supposed to be a solemn obligation. Long ago, after receiving too many "Bum's Rush" decisions in our state court system, this writer despaired of ever receiving even-handed treatment therein, and thereafter he and his former associate limited their practice to the federal court system. By and large, it was a good move, but of late, he has begun to receive "Bum's Rush" decisions in the federal court system as well. As a prelude to such a decision, and after having presented a 22 page Brief with 56 citations to the Sixth Circuit, it was mind-boggling when one of the panelists at oral argument asked: "What do you want us to do?"

The point is -- there should never be one "Bum's Rush" decision in our federal court system; but when, as, and if it happens, then such conduct can hardly be construed as "good Behaviour."

And perhaps House Republican Whip Tom DeLay is out of line when he threatens federal judges by saying: "If you write one decision we don't like, Congress doesn't like, we are going to impeach you," but something must have happened to make him say that. More importantly, it should not have to be the province of Congress to police the federal courts.

And if anything that has been written herein is impropitious, please understand that it is because of the disappointment, disillusionment and emotional strain of having put in thousands of hours over a 10 year period only to ultimately lose by a "Bum's Rush" Opinion.

It doesn't seem unreasonable to expect justice and fair-treatment in our federal court system; but these petitioners know that never happened, and there is ample documentation in this Petition that should persuade this Court that the petitioners' beliefs are legitimate.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-3274

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SANFORD J. BERGER, et al.,
Plaintiffs-Appellants,

v.

SAMUEL R. PIERCE, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed May 20, 1991

Before: RYAN and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

CHARLES W. JOINER, Senior District Judge. Each of the plaintiffs were owners of property along the shore of Lake Erie. Each plaintiff was issued a standard flood insurance policy by the Federal Insurance Administration (FIA) in accordance with the National Flood Insurance Program (NFIP). The policies were renewed annually and were in effect in 1987. Plaintiffs allege that their property was damaged during that year from causes covered by their flood insurance policies. Plaintiffs filed

*Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

a loss claim during this period of renewal. The claims were submitted to Computer Sciences Corporation (CSC), the fiscal agent of the NFIP, for processing. CSC requested GAB Business Services (GAB), an approved NFIP adjustor, to investigate the claims. GAB's report identified "gradual erosion" as the central cause of plaintiffs' losses. This report was processed through CSC, and the FIA denied plaintiffs' claims because their losses were caused by "gradual erosion."

The complaint, filed on May 6, 1988, alleges seven causes of action. Count I seeks a declaratory judgment that provisions in the insurance contract under which plaintiffs' claims were denied are contrary to law and to the congressional intent and therefore not a valid basis for denying the claims. Count II was a claim against the Secretary of Housing & Urban Development (HUD) and is not appealed here. Count III asserts that the FIA was estopped to deny plaintiffs' claims because of the issuance of policies on properties lying within a geographic zone covered by the NFIP. Count IV asserts a RICO claim against the defendants. Count V states a *Bivens* claim against the FIA for disparate treatment of four plaintiffs as compared with other similarly situated policy holders. Counts VI and VII assert state law claims; Count VI, breach of an implied covenant of good faith; and Count VII, a fraud claim.

The defendant FIA filed a motion to dismiss all counts. On February 23, 1990, the district court granted the motion with prejudice as to counts I-V and without prejudice as to counts VI and VII. Defendants CSC and GAB filed motions for summary judgment, which the district court granted contemporaneously with its ruling on the motion to dismiss.

For the reasons stated below, the order of dismissal and summary judgments as to Counts III-VII are affirmed. The order of dismissal and summary judgments as to Count I are reversed and the case remanded to the trial

court. In addition, Count IV is remanded with specific directions.

I.

The NFIP was established in 1968 by the National Flood Insurance Act, 42 U.S.C. §§ 4001-4128 (the Act). The NFIP is a federally-subsidized program which provides flood insurance at below actuarial rates. Congress created the program because of the unavailability of flood insurance from private insurance companies, who were unable to write flood insurance policies on an economically-feasible basis. Initially, the Act covered any "flood" event, defined as "hav[ing] such meaning as may be prescribed in regulations of the Director, and may include inundation from rising waters or from overflow of streams, rivers, or other bodies of water, or from tidal surges, abnormally high tidal water, tidal waves, tsunamis, hurricanes or other severe storms or deluge[.]"

In 1973, responding to a wide-spread demand, Congress broadened the scope of the Act by adding to the definition of "flood" the following: "The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels . . . ." 42 U.S.C. § 4121(c).

The operational methods of the NFIP have changed over time. When the Act was drafted, Congress set up two different methods for operating the program: Plan A, for private-industry involvement, and Plan B, for administrative supervision of the program. From 1968 to 1977, NFIP operated under the statutory Plan A, which permitted the private insurance industry to implement and operate the flood insurance program with limited federal involvement. At the end of that time the Secretary of HUD discontinued Plan A and implemented statutory Plan B. Plan B placed primary responsibility for operating the flood insurance program with the federal government.

Under Plan B, the Federal Emergency Management Administration (FEMA) has managerial responsibility for the operation of the NFIP, among other federal programs, and complete control of the payment or disallowance of all flood insurance claims. FEMA has promulgated a standard flood insurance policy, the primary policy that is involved in this case. 44 C.F.R. § 61, App. A. The FIA is a component organization of FEMA charged with administering the NFIP. The FIA is headed by the Federal Insurance Administrator.

The Administrator, in carrying out his mandate under the Act, defined "flood" in the policy of insurance issued under the Act as:

> (a) A general and temporary condition of partial or complete inundation of normally dry land areas from:
>
> (1) The overflow of inland or tidal waters . . .
>
> (b) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels . . . which results in flooding as defined in (a) (1) of this definition."

44 C.F.R. § 61, App. A (1990). This definition closely parallels the statutory language.

The policy, however, goes on to state certain exclusions. Article III, "Losses not Covered," states, "We only provide coverage for direct physical loss by or from flood which means we do not cover: (A) Losses from other casualties, including: (1) Loss caused by . . . gradual erosion, or any other earth movement except such . . . erosion as is covered under the peril of flood." *See* 44 C.F.R. § 61, App. A.

To assist in the issuance and processing of flood insurance applications and claims, Congress authorized the appointment of a "fiscal agent" to service the NFIP. 42 U.S.C. § 4071. FEMA's regulations likewise authorize the designation of a "servicing agent" to "assist in issuing flood insurance policies . . . and to accept responsibility for delivery of policies and payment of claims for losses as prescribed by and at the discretion of the administrator." 44 C.F.R. § 62.3(a) (1990).

On October 1, 1983, FEMA designated CSC as the fiscal agent for the NFIP. As the fiscal agent, CSC does not underwrite flood insurance policies nor does it have a contractual relationship with the insureds. It merely acts in a ministerial manner as a conduit between FEMA/FIA and the insureds for flood insurance policy applications, claims handling and statistical reporting. FEMA retains ultimate authority over the issuance of policies and the approval or denial of claims. GAB was retained by CSC to investigate claims filed in accordance with 44 C.F.R. section 62.21 and investigated the claims involved in this case. Final decisions regarding claims are not made by GAB, which is an investigating and reporting agency.

To resolve the disputes over disallowed claims under Plan B, Congress established an exclusive right of action allowing policy-holders to challenge the disposition of their claims in federal court. Section 4072 provides in relevant part:

> [U]pon the disallowance by the Director [of FEMA] of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Director, may institute an action against the Director on such claim in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to

> hear and determine such action without regard to the amount in controversy.

42 U.S.C. § 4072. The regulations alternatively permit an action challenging a claimed disallowance to be brought against the FIA, which has decision-making responsibility for the NFIP.

II.

Although the complaint is not as articulate as might be desired, the bottom line of the claims made relates to the question of the policy language's meaning and whether or not that language complies with the mandate of Congress. Before discussing this underlying question, there are preliminary questions that need to be addressed.

A.

CSC and GAB are statutory fiscal agents of the government and at all times were acting pursuant to the instruction and direction of the program's administrators. The statute provides that actions should be brought against the Director. 42 U.S.C. § 4072. The statute does not waive governmental sovereign immunity as to any other persons.

We agree with the reasoning of *Central Claims Service v. Computer Science Corp.*, 706 F. Supp. 463 (E.D. La. 1989), cited by the district court. In *Central Claims*, the district judge drew an analogy to cases analyzing the immunity of fiscal agents under the Medicare Act, which hold that such agents are immune from suit for activities within the scope of the authority delegated to them. CSC alternatively denominates this argument as one that the federal government is the real party in interest, citing *Bushman v. Seiler*, 755 F.2d 653, 655-56 (8th Cir. 1985), and other cases involving analyses similar to that of the court in *Central Claims*. The statutory and regulatory authorization to bring suit for disallowance of claims under NFIP contracts gives the right to sue the Director of

FEMA or the FIA Administrator only, not the FIA's fiscal agents. In sum, this dispute is properly regarded as one between the insureds and FEMA or FIA. *South Carolina v. Baker*, 485 U.S. 505, 523 (1988), and *United States v. New Mexico*, 455 U.S. 720, 735 n.11 (1982), involving the immunity of federal fiscal agents from states taxes, are not relevant to a determination of fiscal agents' immunity to suits arising out of the conduct of their duties on behalf of the federal government. CSC and GAB are not proper defendants, and we affirm the summary judgments in their favor.

Count III asserted that the FIA was estopped to deny plaintiffs' claims on the grounds that plaintiffs' properties lie in a geographical zone covered by the NFIP, that plaintiffs relied on FIA's assertions that they were insured and that their insurance contracts were "secretly modified". There is nothing in the case to suggest that the agency did anything secretly or anything except issue the policy, administer the law, and deny the claims. Whether this was or was not done correctly does not create an estoppel. The district court was correct in dismissing Count III.

Count IV attempts to allege a RICO claim against the federal government, CSC, and GAB. Aside from the fact that the elements of RICO have not been adequately alleged, 18 U.S.C. §§ 1961-2, it is clear that there can be no RICO claim against the federal government. *Cf. Wiley v. Federal Land Bank*, 657 F. Supp. 964 (S.D. Ind. 1987). Section 1962 states a requirement of "racketeering activity" as a predicate for a civil RICO action. Section 1961(1), in turn, defines "racketeering activity," which requires that the defendant be, variously, "chargeable," "indictable," or "punishable" for violations of specific state and federal criminal provisions. The assertion in Count IV that the FIA was engaged in a RICO conspiracy under section 1962(d) was patently defective as a matter of law, since it is self-evident that a federal agency is not subject to state or federal criminal prosecution. The court believes that the effort to encumber the action with this

threatening claim may be an abuse of legal practice. The district court is directed on remand to hold a hearing as to whether Rule 11 sanctions should be applied. Fed. R. Civ. P. 11; *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985).

The district court correctly held as to Count V that a *Bivens* claim may not be asserted against a federal officer in his official capacity, and, in addition, we think that the FIA administrator has an unqualified immunity to claims of this nature. *Holloman v. Watt*, 708 F.2d 1399, 1402 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *Sanchez-Mariani v. Ellingwood*, 691 F.2d 592 (1st Cir. 1982); *see also Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Butz v. Economou*, 438 U.S. 478, 512-14 (1978).

The state law claims set forth in Counts VI and VII are deficient for a number of reasons. As to Count VI, we are in accord with the holdings of several other courts of appeals that federal common and statutory law preempts state principles of contracts law for purposes of the interpretation of NFIP policies, as is expressly stated in the policy. *Sodowski v. National Flood Ins. Program*, 834 F.2d 653, 655 (7th Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988); *Atlas Pallet, Inc. v. Gallagher*, 725 F.2d 131, 135 (1st Cir. 1984); *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979). The district court properly noted as to Count VII that the Federal Tort Claims Act does not waive the sovereign immunity of the United States with respect to claims predicated upon misrepresentations. 28 U.S.C. § 2680(h).

Plaintiffs also allege as error the district court's refusal to permit discovery. Each of the rulings of the district court which we have upheld was ruled upon as a matter of law and could not have been altered by discovery. There was no material error. As to Count I, which is to be remanded to district court, the district court may now open discovery on the issues to be resolved.

B.

This case is based on an insurance contract issued pursuant to directions of Congress, and regulated and adopted pursuant to congressional action. The meaning and effect of the insurance contract depends on the meaning and effect of the regulations, and the statute authorizing and directing the regulations and defining the coverage. We have an obligation to harmonize the regulations and statute if possible but, if not, our obligation is to uphold the statute.

The court's dismissal of Count I was error for the reason that it was not proper to hold categorically that "gradual erosion" is not covered under the NFIA and the policies issued thereunder. The statute is broad. Although it defines "flood" to have such meaning "as may be prescribed in the regulations," it continues the definition with an imperative, "the term 'flood' *shall* also include the collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels . . . ." 42 U.S.C. § 4121(c) (emphasis added). Plaintiffs alleged that Lake Erie was exceeding anticipated cyclical levels at the time their properties were damaged.

Congress did not create an exception for gradual erosion. Congress directed that policy coverage turn on "waves" or "currents" that "exceed[ ] anticipated cyclical levels." Until there is an examination of the facts with attention to whether the "erosion or undermining" was caused by "waves or currents of water exceeding anticipated cyclical levels," there can be no determination as to whether or not the property was damaged in a manner compensable under the statute or the contract.

The broad statement of policy leading up to the Act's amendment in 1973 points to the same conclusion:

> **(g) Erosion and undermining of shorelines by waves or currents.** The Congress also finds that (1) the damage and loss which may result from the erosion and undermining of shorelines by waves or currents in lakes and other bodies of water exceeding anticipated cyclical levels is related in cause and similar in effect to that which results directly from storms, deluges, overflowing waters, and other forms of flooding, and (2) the problems involved in providing protection against this damage and loss, and the possibilities for making such protection available through a Federal or federally sponsored program, are similar to those which exist in connection with efforts to provide protection against damage and loss caused by such other forms of flooding. It is therefore the further purpose of this title to make available, by means of the methods, procedures, and instrumentalities which are otherwise established or available under this title for purposes of the flood insurance program, protection against damage and loss resulting from the erosion and undermining of shorelines by waves or currents in lakes and other bodies of water exceeding anticipated cyclical levels.

42 U.S.C. § 4001(g). We do not hold at this time that there is liability. We only hold that the district court was in error when it held that the gradual erosion exclusion, under the facts as alleged in this case, would justify dismissal of this action for failure to state a claim.

The difficulties in this case start with FIA's decision denying the plaintiffs' claims on the ground of "gradual erosion." If it is true that the damages resulted from gradual erosion, the next step in the analysis under the policy, regulations and statutes requires an examination of whether the exclusion of "gradual erosion" under the policy's Article III, "Losses not Covered," is applicable. That provision, purporting to exclude from coverage losses resulting from "gradual erosion" itself contains an

exception. This exception states "except such . . . erosion as is covered under the peril of flood." This leads back to the policy's definition of flood, which includes "erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels . . . ." Thus, the statutory and policy coverage first turns on "waves or currents of water exceeding anticipated cyclical levels" and the exclusion written in the policy turns on the same facts. There is much more for the decision-maker to do before denying these claims.

While the FIA correctly asserts that its regulations are entitled to great deference because they were enacted contemporaneously with the statutory amendment, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), "an agency's interpretation of a regulation is valid, however, only if that interpretation complies with the actual language of the regulation." *Fluor Constructors, Inc. v. Occupational Safety & Health Review Comm'n*, 861 F.2d 936, 939 (6th Cir. 1988); *see generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). If, as plaintiffs allege, the FIA interpreted the "gradual erosion" exclusion in these cases so as to read out erosion damage caused by water exceeding anticipated cyclical levels, then the FIA exceeded its authority under the statute.

The FIA's arguments to this court are primarily addressed to the consistency of the regulations' "flood" definition with the statute's, in an attempt to defend the conclusions of the district court, but these arguments blur the distinction between the facial amenability of the regulations to the statute, and the amenability of the administrative interpretation as to plaintiffs, with the agency's regulations. The FIA argues, "[t]he regulations are not in conflict with the statutes but, rather, are consistent with the statutory definitions pertinent to what constitutes gradual erosion." "Gradual erosion," however, is not a term which appears in the statute at all. The FIA further argued in the district court:

> Clearly, Congress intended that erosion only be covered when it was caused by a sudden and unexpected force of nature as opposed to the normal action of tides. The words "exceeding anticipated cyclical levels" are indicative of an intent to limit recovery under the NFIP to losses caused by abnormal erosion.

The district court observed, "[i]t is clear from the [regulations'] definition that flood related erosion is a covered loss. Gradual erosion, however, is not." While the FIA's argument, and the district court's analysis of it, are not entirely clear, they appear merely to beg the question. What Congress intended to cover was (1) damage caused by shoreline erosion, (2) resulting from cyclical water levels exceeding those anticipated. It is apparent to us that there cannot be any temporal limitation on the requisite erosion, of the type advocated by the FIA. Moreover, "erosion" implies a gradual process. We agree with the FIA that Congress intended to draw a distinction between usual and unusual events. However, that distinction is entirely satisfied when it is determined whether or not the erosion which caused the insured's loss was caused by water "exceeding anticipated cyclical levels." Nothing more sudden or unusual is necessary. Indeed, the FIA cites former FIA guidelines which demonstrated an acknowledgment of this:

> [T]he concept of flood now includes a type of erosion: an erosion caused by high levels of water in a lake or other body of water. The fact situation for coverage to apply does not require surface flooding, nor severe storm conditions. The touchstone for coverage is a finding of waves or currents of water exceeding anticipated cyclical levels.

41 Fed. Reg. 36,632 (1976).

The FIA also argued in the district court that the FIA's interpretation of a "gradual erosion" exclusion to

incorporate a requirement of suddenness was based upon the legislative history of the 1973 amendment to the "flood" definition. Plaintiffs properly point out, however, that recourse to the legislative history is not warranted where Congress has spoken unambiguously in the statute. *United States v. Oregon*, 366 U.S. 643 (1961); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). In sum, we disagree with the district court that plaintiffs failed to state a claim. It is apparent that the FIA's application of its regulations to plaintiffs was in error, if plaintiffs can substantiate their claim that their losses resulted from erosion by water exceeding the anticipated cyclical levels, as those are administratively defined. The administrative "gradual erosion" exception, whatever its applicability in other circumstances, cannot contravene Congress' express intent to compensate claimants under the circumstances alleged by plaintiffs.

As to Counts III through VII, the district court is **AFFIRMED** as outlined herein and based upon the memorandum and opinion of the district court, filed February 23, 1990. As to Count IV, the district court is directed to hold a hearing to determine whether Rule 11 sanctions should be applied against the plaintiffs, their attorneys, or both, for the filing and prosecution of this count.

As to Count I, we **REVERSE** and **REMAND** for proceedings in accordance with this opinion.

NOT RECOMMENDED FOR PUBLICATION

No. 91-3982

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANFORD J. BERGER;LULU WILLS;PHILIP & ELEANOR REES;and GERRIT JOOSTEN	)	FILED DEC 22, 1992 Leonard Green,Clerk
Plaintiffs-Appellants	)	ON APPEAL FROM
v.	)	THE UNITED STATES DISTRICT COURT
SAMUEL PIERCE, et al.	)	FOR THE NORTHERN
Defendants-Appellees	)	DISTRICT OF OHIO

BEFORE: MILBURN and NORRIS, Circuit Judges; KRUPANSKY, Senior Circuit Judge.

PER CURIAM: In this appeal, we revisit a question concerning the interpretation to be given a 1973 amendment to the National Flood Insurance Act, 42 U.S.C. Secs. 4001-4029 ("the Act"). We addressed that amendment and remanded this cause to the district court for further fact finding in Berger v. Pierce, 933 F.2d 393 (6th Cir.1991) ("Berger I").

The Act created a federally subsidized program that provides flood insurance. Congress created the program because private insurance companies had been unable to write flood insurance policies that were economically feasible. In 1973, Congress broadened the scope of the Act by including within the definition of "flood" the "collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels." 42 U.S.C. Sec. 4121(c).

Plaintiffs are property owners along Lake Erie, in Willoughby, Ohio. They were issued

standard flood insurance policies by the Federal Insurance Administration ("FIA"). The shore side of the land upon which plaintiffs' homes were located overlooked the beach and was bounded by a cliff. Under normal conditions, the beach prevented lake waters from touching the base of the cliff. Plaintiffs contend that during 1986 and into 1987, Lake Erie continually exceeded its anticipated level to such an extent that the beach was flooded over and waves from the lake eroded and undermined the cliff supporting their homes. When their homes became uninhabitable during 1987, they sought recovery under their flood insurance policies. When the FIA denied their claims, they filed this lawsuit seeking a declaratory judgment that certain provisions of the insurance contract upon which their claims were denied are contrary to the Act.

The FIA, citing legislative history, had argued before the district court that

> *Congress intended that erosion only be covered when it was caused by a sudden and unexpected force of nature as opposed to the normal action of tides. The words "exceeding anticipated cyclical levels" are indicative of an intent to limit recovery under the [flood insurance program] to losses caused by abnormal erosion.*

Berger I, 933 F.2d at 399. The district court agreed and dismissed plaintiffs' claims on the basis that their loss was caused by "gradual erosion," which was not covered under the flood insurance policies. The district court stated that "[i]t is clear from the [regulations'] definition that flood related erosion is a covered loss. Gradual erosion, however, is not." Id.

We held that the district court had erred:

> *Congress did not create an exception for*

gradual erosion. Congress directed that policy coverage turn on "waves" or "currents" that "exceed[] anticipated cyclical levels." Until there is an examination of the facts with attention to whether the "erosion or undermining" was caused by "waves or currents of water exceeding anticipated cyclical levels," there can be no determination as to whether or not the property was damaged in a manner compensable under the statute or the contract.

...While the FIA's argument, and the district court's analysis of it, are not, entirely clear, they appear merely to beg the question. What Congress intended to cover was (1) damage caused by shoreline erosion, (2) resulting from cyclical water levels exceeding those anticipated ... We agree with the FIA that Congress intended to draw a distinction between usual and unusual events. However, that distinction is entirely satisfied when it is determined whether or not the erosion which caused the insured's loss was caused by water "exceeding anticipated cyclical levels." Nothing more sudden or unusual is necessary.

Id. at 398-399,

Since it was undisputed that the policyholders' loss was the result of shoreline erosion, the district court's task upon remand was to determine whether that shoreline erosion resulted from cyclical water levels exceeeding those anticipated. Upon remand, however, the FIA once again asserted what it said was the intent of Congress, which was to require proof of "waves or currents of water which are severe

or of unanticipated force...an unusual occurrence, more than high lake water levels." The district court once again accepted these arguments, holding that the erosion damage must be "caused by an unusually high water level... accompanied by a severe storm or an unanticipated force of nature." Berger v. Pierce, No. 1:88CV1147 at 11 (N.D.Ohio Aug. 30, 1991).

Both the FIA and the district court improperly relied upon legislative history[1] to reach a conclusion contrary to the law of this case, as can be seen from our opinion in Berger I quoted above. Plaintiffs were not required to prove that a severe storm or other unanticipated force of nature was a cause of their erosion loss, so long as the erosion was occasioned by the natural action of the waves or currents in the lake at the time when its water[2] exceeded anticipated cyclical levels.

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[1]As we noted in Berger I, "recourse to the legislative history is not warranted where Congress has spoken unambiguously in the statute. Berger I, 933 F.2d at 399. The plain language of 42 U.S.C. Sec. 4121(c) extends coverage to erosion losses caused by "waves or currents of water exceeding anticipated cyclical levels" without further qualification.

[2]The FIA asserts that the policyholders do not prove that Lake Erie's "waves or currents of water" exceeded anticipated cyclical levels when they prove that Lake Erie's water levels exceeded anticipated cyclical levels. This is a distinction without a difference. Wave and current levels undoubtedly change when the underlying water level changes, and the record clearly shows that the Federal Emergency Management Administration ("FEMA"), the federal agency which has the mana-

The factual determination we sought from the district court were (1) the "anticipated cyclical level" of Lake Erie's waters during the time the policyholders suffered the shoreline erosion damage(i.e., April and May of 1987), and (2) the actual level of Lake Erie's waters during that same time.

Although the district court received evidence from both sides, it did not identify either the anticipated or actual lake levels for April and May of 1987. Nevertheless, it concluded that the policyholders had not proved that their erosion damage had been caused by waves or currents of water exceeding anticipated cyclical levels. We are unable to find any evidence in the record that would support such a conclusion.

Ordinarily, such error would require yet another remand to the district court. However, after thoroughly reviewing the record before us and the arguments of counsel, we conclude that all the evidence in the record demonstrates that Lake Erie did exceed its anticipated cyclical level at the time it caused the policyholders' erosion damage.

The policyholders presented the district

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gerial responsibility for the program, uses lake levels to determine when "waves or currents of water" exceed anticipated cyclical levels. A FEMA policy statement dated April 10, 1987, states that "[o]ne of the best technical sources of guidance we employ" for "determining when the abnormal event of 'waves or currents of water exceeding anticipated cyclical levels' has occurred" is the Monthly Bulletin of Lake Levels for the Great Lakes -- the very document the policyholders submitted at trial.

court with the Monthly Bulletin of Lake Levels for the Great Lakes, a detailed report from the United States Army Corps of Engineers. This report averaged data from 1900 to 1986 to show the historic average level of Lake Erie during each month of the year. It also reported the actual lake levels for April and May of 1987. This data demonstrated that the actual water levels for April and May of 1987 exceeded the 1900-1986 historic averages for April and May by 2.1 and 1.85 feet, respectively. The policy-holders cite this report as proof that Lake Erie exceeded its anticipated cyclical levels during this time.

The FIA does not dispute the accuracy of this data. Instead, it argues that the benchmark for "anticipated cyclical levels" should not be long-term historical averages, but data from 1973, the year that the amendment to the Act was enacted. When pressed on this point during oral argument however, counsel for the FIA could cite no evidence in the record establishing 1973 as the benchmark for anticipated cyclical levels. In fact, the record shows that in the nineteen years since Congress enacted the amendment, neither the FIA nor FEMA have ever authoritatively defined "anticipated cyclical levels."

The FIA's position that a single year's water levels should be viewed as "anticipated cyclical levels" merely on the basis that legislation was passed during that year, is not persuasive. Since 1973 was a year of unusually high water levels, we doubt that Congress intended those levels to serve as the benchmark for anticipated future norms. Moreover, data for a single year provide only a statistical "snapshot," rather than the broad overview that one would expect to be necessary in order to anticipate future events, such as "cyclical levels" with confidence.

The 1900-1986 averages, on the other hand, do indicate average water levels over a long period of time. In addition, the policyholders introduced several FEMA policy statements which referred to long-term lake levels while addressing inquiries about anticipated cyclical levels. For these reasons, we conclude that all the evidence in the record demonstrates that the computation by the Army Corps of Engineers of 1900-1986 average lake levels provides the apporopriate benchmark for determining the "anticipated cyclical levels" of Lake Erie in April and May of 1987.

Since it is undisputed that the actual water levels in Lake Erie exceeded the 1900-1986 averages by 2.1 feet in April 1987 and 1.85 feet in May, the record is equally clear that the water level in Lake Erie exceeded anticipated cyclical levels at the time when shoreline erosion caused the policyholders' damage.

Given the circumstances of this case as well as the facts presented in the record, the only conclusion available to us is that the policyholders have indeed proved that their erosion damage was caused by "waves or currents of water exceeding anticipated cyclical levels." 42 U.S.C. Sec. 4121(c). They are therefore entitled to compensation under the terms of their standard flood insurance policies.

The order of the district court is reversed, and this cause is remanded to the district court with instructions to enter a declaratory judgment in favor of the policyholders to the effect that the FIA interpretation of 42 U.S.C. Sec. 4121(c) and of the exclusion provision in its policy relative to gradual erosion are contrary to law, and are not a valid basis for denying the policyholders' claims under the circumstances of this case. The district court also is directed to reconsider the policyholders' request for attorney fees, in light of our decision today.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SANFORD BERGER, et al.	)	FILED NOV. 16, 1994
Plaintiffs	)	JUDGE
vs.	)	LESLEY BROOKS WELLS
SAMUEL PIERCE, et al.	)	Case No. 1:88CV1147
Defendants	)	MEMORANDUM OF OPINION

I.

The complaint commencing this case was filed on May 6, 1988, by four Lake Erie shoreline property owners.[1] Each of the four had a flood insurance policy issued by the Federal Insurance Administration, in accordance with the National Flood Insurance Program ("NFIP"). The seven-count complaint alleged claims against the Administrator of the Federal Insurance Administrator ("FIA"), the Secretary of Housing and Urban Development, Computer Sciences Corporation, and GAB Business Services, Inc. ("Defendants").

District Judge Alvin I. Krenzler was originally assigned to this case. On February 23, 1990 Judge Krenzler granted Defendants' motion to dismiss and motion for summary judgment on all

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[1] The original Plaintiffs in this action were Sanford J. Berger, Lulu Willis, Philip Rees and Gerrit Joosten. All of the Plaintiffs with the exception of Sanford Berger ("Berger") have settled their claims. Because Berger's claims alone are before this Court, Plaintiffs will be referred to as "Berger" throughout this Memorandum of Opinion.

counts of the complaint. See Memorandum of Opinion (Docket No. 59). Berger appealed the order of dismissal on Counts I and 3-7. The Sixth Circuit affirmed the District Court's holding on Counts 3-7 of Berger's complaint and remanded Count 4, a RICO claim, for a Rule 11 hearing because Berger's RICO claims were held to be wholly without legal basis. Berger v. Pierce, 933 F.2d 393 (1991) ("Berger I"). Count 1 was reversed and remanded to the District Court. Id.

Count 1 involved Berger's claim that policies isued under the National Flood Insurance Act ("NFIA"), 42 U.S.C. Sec. 4001-4128 cover losses resulting from soil erosion. Flood insurance covers "the collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or current of water exceeding anticipated cyclical levels." 42 U.S.C. Sec. 4121(c).

The Sixth Circuit found the District Court's categorical denial of coverage for gradual erosion to be erroneous. Id. at 397. Therfore, the Sixth Circuit remanded the case and instructed the District Court to examine "the facts with attention to whether the 'erosion or undermining' was caused by 'waves or currents of water exceeding anticipated cyclical levels. Id. at 398.

On remand, the District Court held a hearing and concluded Berger was not entitled to proceeds from the insurance policy. The Court reasoned:

> The Committee Report clearly states that the damage must be caused by an unusual high water level in a natural body of water accompanied by a severe storm or an unanticipated force of nature. It clearly stated that the amendment is not intended to provide coverage for the losses incurred when properties built too close to the shorelines

> are eventually damaged as a result of normal and continuous wearing away of the land by ordinary wave action. If the loss is gradual and takes place over a course of years, it would not be covered.

Memorandum of Opinion (Docket No. 87) at 11. Because Berger failed to prove by a preponderance of the evidence "that the collapse or subsidence of land along the shore of Lake Erie was the result of undermining caused by waves or currents of water exceeding anticipated cyclical levels at the time of the alleged damage," the District Court ruled in Defendants' favor. Id. at 13.

On appeal, the Sixth Circuit reversed the District Court's holding and remanded with instructions to enter a declaratory judgment in Berger's favor. Berger v. Pierce, Case No. 91-3982 (6th Cir. decided December 22, 1992) ("Berger II").

Judge Krenzler retired in July, 1992. No declaratory judgment was entered in accordance with the Sixth Circuit's instructions.

On May 12, 1993, the case was referred by Chief Judge Thomas D. Lambros to Magistrate Patricia Hemann (Docket No. 105). Magistrate Judge Hemann filed four Reports and Recommendations ("Recommendations") on pending motions in the case.

II.

On August 6, 1993, Magistrate Judge Hemann filed a Recommendation (Docket No. 119) denying Plaintiffs'Motion To Reconsider Class Certification and Supplemental Motion for Declaratory and Injunctive Relief (Docket Nos. 110 & 111). None of the parties filed objections to the Magistrate Judge's Recommendation. Pursuant to 28 U.S.C. Sec. 636(b)(1)(A)-(C), this Court adopts the Magistrate Judge's Recommendation in full. See

United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

III.

In November and December, 1993, the Magistrate Judge filed two Recommendations (Docket Nos. 126 & 132) denying Berger's motion for attorney fees, pursuant to 28 U.S.C. Sec. 2412(b) and (d)(1)(A) (Docket No. 77). The Magistrate Judge concluded an award of attorney fees under 28 U.S.C. Sec. 2412(b) would not be justified because the government did not act vexatiously, wantonly, or in bad faith. Further, the "common benefit" exceptions did not warrant an award of fees. Because Defendants' position was "substantially justified" throughout this litigation, the Magistrate Judge recommended that no award of fees under 28 U.S.C. Sec. (d)(1)(A) be provided to Berger.

Berger filed objections to the Magistrate Judge's Recommendations. Berger reasserts that attorney fees should be assessed because (1) Defendants acted in bad faith during this litigation; 2) the "common benefit" exception to bad faith requirement applies in this case; and 3) Defendants' position that benefits should be denied was substantially unjustified.

Local Rule 5:3.1(b) and 28 U.S.C. Sec. 636(b)(1)(c) require this Court undertake de novo consideration of objections to a Magistrate Judge's Recommendation. In this case, de novo review revealed Berger's objections lacked merit.

A court may order the United States to pay reasonable attorney fees and expenses to the same extent as any other party under the common law. 28 U.S.C. Sec. 2412(b). Fee awards are generally precluded unless the loosing party has acted in bad faith, vexatiously, or wantonly. F.D. Rich Co.,Inc. v. United States, 417 U.S. 116,129 (1974). Subjective bad faith must be demonstrated to justifiy a fee award. Bergman

v. United States, 844 F.2d 353,357 (6th Cir. 1988). This stringent standard is justified by the extraordinary, punitive nature of a fee award. Id.

Berger cites FIA correspondence to politicians in 1986 regarding flooding in Great Lakes regions as evidence of objective bad faith throughout this litigation. Berger complains that FIA paid, without controversy, the claims in insureds other than Berger, who brought claims for erosion by Lake Erie's shore. This evidence does not rise to the level of subjective bad faith justifying a fee award under 28 U.S.C. Sec. 2412(b).

Berger asserts the Magistrate Judge erred in failing to apply the "common benefit" exception in this case. The "common benefit" exception applies when a plaintiff's successful litigation confers a substantial benefit on members of an ascertainable class and a fee award will spread costs proportionally among class members. Hall v. Cole, 412 U.S. 1,7-8 (1973). The rationale of the common benefit exception is to prevent unjust enrichment of class members at plaintiff's expense. Id.

Berger's common benefit argument fails for two reasons. First, Berger has failed to identify an ascertainable class of beneficiaries. Second, Berger has not conferred any substantial benefit to others. No class has been certified. Any "beneficiaries" of Berger's suit would have to bring a claim in their own right. Thus, the public policy of preventing unjust enrichment is absent under these circumstances.

Fees may be awarded if the United States' position is not "substantially justified." 28 U.S.C. Sec. 2412(d)(1)(A). Berger suggests that Defendants' position following the remand of Berger I was not justified. A review of the record indicates the Defendants' position through-

out proceedings following Berger I were consistent with the Sixth Circuit's Berger I opinion.

The Magistrate Judge's Recommendation on Berger's motion for fees is adopted in full. Berger's motion for fees is denied.

IV.

The Magistrate Judge considered pending cross motions (Docket Nos. 138 & 146) for summary judgment on the amount of Berger's damages in a Recommendation filed April 4, 1994. The Magistrate Judge recommended both motions be denied because of the existence of material issues of fact between the parties. Both parties objected to the Recommendation.

Summary judgment is proper when, "pleadings, depositions, answers to interrogatories,... toghether with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). See Celotex Corp v. Catrett, 477 U.S. 317,322-23 (1986).

Affidavits offered in support of both motions for summary judgment present differing views of Berger's damages. Berger included an Affidavit of Licensed Public Adjuster Gerald J. Curran ("Curran") with his motion for summary judgment. Curran examined documents and photographs regarding Berger's alleged losses. See Berger's Motion ("Berger's Motion") for Summary Judgment at Exhibits ("Ex.") A-E. Curran concluded Berger is entitled to $68,200 to compensate him for a "total loss" of his property in 1987.

By contrast, Defendants included an Affidavit of NFIP Adjuster Richard Allen ("Allen"). Allen inspected Berger's property and reviewed Berger's deposition and NFIP claim file. See Attachment to Defendants Motion for Summary Judgment. Allen could not find any evidence of

destruction and estimated Berger is entitled to $1,500 for costs incurred in stabilizing the foundation of his home. Id.

Allen also contends that "seasonal residences" are exempt from replacement cost protection under Article VII of Berger's NFIP policy. Id. Curran suggests that provisions for replacement cost under Article VII of Berger's policy apply because an NFIP Final Report indicates the "insured qualifies for R/C coverage." See Berger Motion at Ex. C & D.

Significant issues of material fact, such as the value of Berger's losses and the effect of NFIP report notations on the Article VII exclusions prevent summary judgment on the damages issues before the Court.

V.

The Magistrate Judge considered Defendants' motion for summary judgment on Berger's claim for prejudgment interest (Docket No. 146) in the April, 1994 Recommendation. The Magistrate Judge concluded that an award of prejudgment interest should not be permitted. Berger filed objections to all aspects of the Magistrate Judge's reasoning. De novo review demonstrates that Berger's objections lack merit.

The United States is generally immune from awards of interest. Library of Congress v. Shaw 478 U.S. 310 (1986). Interest may be awarded when: 1) interest payments are constitutionally required in a taking case; 2) interest payments are specifically required by statute; or, 3) the government has assumed the status of a private commercial enterprise. Id.

In Sandia Oil Co., Inc. v. Beckton, 889 F.2d 258 (10th Cir.1989), the court considered exceptions to the general rule prohibiting awards of interest against the government in the context of the NFIA. The court held, "[b]y no stretch of the language in Sec. 4072 can it be construed

as expressly consenting to interest awards against FEMA [The Federal Emergency Management Agency]." Id. at 262.

Pointing to legislative intent and purpose of NFIA, the Court held interest awards improper because NFIA was not intended as a commercial enterprise. The court explained:

> If Congress intended FEMA's flood insurance to be a "commercial enterpise," it certainly made a poor investment. Indeed, the program was set up originally because it was "uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions. 42 U.S.C. Sec. 4001(b)(1). It is unlikely that Congress intended to accomplish what the private insurance industry could not without any burden on the public fisc. The flood insurance program was intended from the beginning to be, not a commercial enterprise, but rather a subsidized insurance program..designed to accomplish important national goals at some cost to the national treasury.

Id at 263-64. This reasoning dictates that Berger's demands for prejudgment interest cannot proceed as a matter of law.

VI.

In conclusion, Berger's motion for attorney fees, pursuant to 28 U.S.C. Secs. 2412(b) and (d)(1)(A) (Docket No. 77) is denied. The cross-motions (Docket Nos. 138 & 146) for summary judgment on the amount of Berger's damages are denied. Defendants' motion for summary judgment on Berger's claim for prejudgment interest (Docket No. 146) is granted.

In addition, this Order moots Berger's repeated requests for rulings. Berger's motion for a single judgment entry (Docket No. 150) and

request for ruling (Docket No. 155) are denied as moot.

IT IS SO ORDERED.

s/ Lesley Brooks Wells
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SANFORD BERGER, et al. Plaintiffs	FILED Aug.8, 1996
vs.	JUDGE LESLEY BROOKS WELLS
SAMUEL PIERCE, et al. Defendants	Case No. 1:88CV1147
	MEMORANDUM OF OPINION

The complaint commencing this case was filed on May 6, 1988 by four Lake Erie shoreline property owners.[1] Each of the four had a flood insurance policy issued by the Federal Insurance Administration, in accordance with the National Flood Insurance Program ("NFIP"). The seven-count complaint alleged claims against the Federal Insurance Administrator, the Secretary of Housing and Urban Development, Computer Sciences Corporation, and GAB Business Services Inc. ("Defendants")

District Judge Alvin I. Krenzler was originally assigned to this case. Following an appeal of Judge Krenzler's judgment against Berger, the Sixth Circuit Court of Appeals remanded the case with instructions to enter a declaratory judgment in Berger's favor on the only remaining claim before the Court. In accordance with

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[1] The original plaintiffs in this action were Sanford J. Berger, Lulu Willis, Philip Rees and Gerrit Joosten. All of the Plaintiffs with the exception of Sanford Berger ("Berger") have settled their claims

the order of remand, a judgment that Berger was entitled to compensation, subject to the terms of his insurance policy ("the Policy") issued under the National Flood Insurance Act, 42 U.S.C. Secs. 4001-4128, was entered on November 16, 1994.

The remaining issue before the Court is the amount of damages, if any, owed Berger under the terms of the Policy. This case was referred to Magistrate Judge Patricia Hemann ("the Magistrate Judge") for the purpose of issuing a Report and Recommendation ("Recommendation") on the amount of damages owed Berger. The Magistrate Judge held a hearing on April 4, 1995, and concluded that Berger is not entitled to damages under the Policy.

Berger filed objections to the Magistrate Judge's Recommendation. Local Rule 5:3.1(b) and 28 U.S.C. Sec. 636(b)(1)(c) require this Court undertake de novo consideration of objections to a magistrate judge's findings. De novo review permits a district judge to place as much reliance as dictated by sound discretion on the findings of a magistrate judge. United States v. Raddatz, 447 U.S. 667 (1980). A district court sitting in de novo review of a magistrate judge's decision is not required to rehear testimony presented to the magistrate judge. A district court must only make a de novo determination of the magistrate judge's findings based on the record. Taylor v. Farrier, 910 F.2d 518 (8th Cir.1990). In this case, de novo review revealed Berger's objections lacked merit.

The Magistrate Judge set forth the following facts:

> Berger... was the owner of a residential property at 1 Chestnut Street, Willoughby, Ohio (the "Property")....From April 17, 1987 through April 17, 1988, the Property was

> *insured under standard insurance policy number 1-9171-9088-4 (the "Policy"), building and contents, in the amount of $68,200.00 and $7,100.00 respectively.*
>
> *On May 19, 1987 the National Flood Insurance Program ("NFIP") claims department received a Notice of Loss with respect to the Property. The Notice of Loss was submitted by...Berger's [insurance] Agent. The date of loss was identified as May 13, 1987. The Notice of Loss contains the following [r]emarks: "Home is perched on brink and uninhabitable. Land washed away from erosion. $500 deductible."*

Recommendation at 1-2.

The Magistrate Judge held a hearing on April 4, 1995. Berger proferred his own testimony and that of Gerald Curran ("Curran"), an insurance adjuster with experience at evaluating losses. Curran reviewed insurance claim records and concluded that Berger was entitled to replacement cost of the residence located on the Property under the Policy.

The Defendants proferred testimony of an expert witness, Richard Allen ("Allen"), who had viewed the Property in 1993. Allen testified that Berger was not entitled to replacement cost coverage for the Property. Several photographs and reports from the 1987 time frame were introduced into evidence. However, none of the testifying witnesses (with the exception of Berger) testified from their own knowledge about the condition of the Property on the date of loss in May, 1987.

The Magistrate Judge reviewed the provisions of the Policy in the Recommendation. The Policy covers "Direct Physical Loss By or From Flood," defined as, "any loss in the nature of actual

loss of or physical damage, evidenced by physical changes, to the insured property...which is directly and proximately caused by a 'flood.'" [2] *The Policy also provided that coverage does not include damage to loss of "fences, retaining walls, seawalls,...bulkheads,... land values, lawns, trees, shrubs or plants..[and/or] other surfaces outside the foundation walls of the building."*

Judging from the testimony of witnesses and photographs of the Property taken in 1987, the Magistrate Judge concluded that the Property was not a "total loss" in 1987. In addition, the Magistrate Judge found that Berger was not entitled to any damages under the Policy.

Berger raises three objections to the Magistrate Judges's Recommendation. First, Berger objects to the Magistrate Judge's conclusion that "the property was the same in 1993 as it was on May 13, 1987." Objections at p.2. This statement unfairly characterizes the Magistrate Judge's conclusion that:

> *Berger adduced testimony that erosion does not get better but only gets worse. If that is indeed the fact, one can conclude that when Allen viewed the property in 1993 it was in the same or worse shape that on the date of loss. It was not uninhabitable in 1993 and thus would not have been in 1987 given that there is no evidence that Berger undertook measures to "revive" the house structurally.*

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[2] The Sixth Circuit concluded that erosion caused by lake waters exceeding cyclical levels constituted damage caused by a "flood." See Berger v. Pierce, Case No. 91-3982, 1992 WESTLAW 393595 (decided December 22, 1992).

Recommendation at 9. As Berger himself testified that the Property had been used continuously as a summer home from 1987 onward, it was painted approximately three years ago, and has never been condemned by the Willoughby Building Department, the Magistrate Judge did not err in the conclusion that the Property was not uninhabitable in 1987.

Second, Berger claims entitlement to a default judgment in the amount of $68,2000.00. Berger has not filed a motion for default judgment and this argument plainly lacks merit.

Third, Berger contends the Magistrate Judge improperly discredited Curran's testimony that the Property was a total loss and Berger was entitled to full replacement cost of the Property. The Magistrate Judge concluded:

> Curran admitted that he had never visited the Property and stated, "Your [sic] cannot make an adjustment without seeing the property." He stated that he was testifying as an adjuster and not a reviewer of documents...Curran admitted that Article V of the SFIP [Standard Flood Insurance Policy] excludes damage to land values, lawn, and surfaces outside of the foundation of an insured's house.
>
> The Magistrate Judge discounts the testimony of Curran. He was not proferred as an expert. He testified as an adjuster, not as a "reviewer of documents," and yet he had never visited the property, although he took the position that a physical inspection was essential. His opinion was based solely on his interpretation of Sweeney's reports, while acknowledging that Sweeney [the independent adjuster who prepared initial reports in 1987] was not the final decisionmaker in the process and acknowledging that he did not know what Sweeney was thinking when

he completed the reports.

Recommendation at 3-4. The Magistrate Judge's credibility determinations are supported by the testimony and evidence presented at the hearing.

As all of Berger's objections lack merit and are overruled, the Magistrate Judge's Recommendation is adopted in full.

Berger has been found not to be entitled to damages. Therefore, his motion requesting modification of the Court's prior order regarding prejudgment interest (Docket No. 178) is denied. Berger's request for a ruling on his objections, contained in the same motion, is denied as moot.

IT IS SO ORDERED.

/s/ Lesley Brooks Wells
UNITED STATES DISTRICT JUDGE

NOT RECOMMENDED FOR PUBLICATION

No. 96-4112

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANFORD J. BERGER; LULU WILLS; PHILIP and ELEANOR REES; and GERRIT JOOSTEN Plaintiffs-Appellants v. ANDREW CUOMO, Secretary of H.U.D., et al. Defendants-Appellees	FILED NOV 10, 1997 Leonard Green, Clerk ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO MEMORANDUM OPINION

BEFORE: KEITH, BOGGS, and NORRIS, Circuit Judges.

PER CURIAM. Plaintiffs, Sanford J, Berger, Lulu Wills, Philip and Eleanor Rees, and Gerrit Joosten, appeal from the district court's refusal to award attorneys' fees and prejudgment interest, as well as damages to Berger that he claimed under his flood insurance policy.

In support of their claim for attorneys' fees, plaintiffs point to 1986 letters from the Federal Emergency Management Agency to Ohio's governor and other elected officials. Plaintiffs assert these letters demonstrate defendants' bad faith in denying payments under plaintiffs' policies. Although the letters include language that sometimes appears to support plaintiffs' position that they were entitled to payment, they also include language contrary to that position. Accordingly, we are unable to say that the magistrate judge was not warranted in concluding that "[r]ead

as a whole, both letters support the position the defendants took at trial." That reading was adopted by the district court.

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the district court erred in denying attorneys' fees and pre-judgment interest, or in denying the damages sought by Berger.

Because of the reasoning that supports judgment for defendants has been articulated by the district court, the issuance of a detailed opinion by this court would be duplicative and serve no useful purpose. Accordingly, the actions of the district court are ***affirmed*** *upon the reasoning employed by that court in its Opinions on November 16, 1994, and August 8, 1996.*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

96-4112

SANFORD J. BERGER, ET AL.
Plaintiffs-Appellants

v.

ANDREW CUOMO, Secretary of H.U.D., ET AL.
Defendants-Appellees

FILED
JAN 28 1998
Leonard Green, Clerk

ORDER

BEFORE: KEITH, BOGGS, and NORRIS, Circuit Judges.

The court having received a petiton for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

CONSTITUTION OF THE UNITED STATES
ARTICLE III, SECTION 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. Sec. 372(c)(3)(A)

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may --
(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, ...

RULES OF THE JUDICIAL COUNCIL OF THE SIXTH CIRCUIT GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT OR DISABILITY
Rule 1(b) in pertinent part

(b) What May Be Complained About. The law authorizes complaints about United States circuit judges, district judges, bankruptcy judges or maigistrate judges who have "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts"...

"Conduct prejudicial to the effective and expeditious administration of the business of the courts" is not a precise term. ... It does not include making wrong decisions--even very wrong decisions-- in cases. The law provides that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."

EQUAL ACCESS TO JUSTICE ACT

28 U.S.C. Sec. 2412(b)

Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. Sec. 2412(d)(1)(A)

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

U.S. Supreme Court Rule 10(a) (in part)

The following ... indicate the character of the reasons the Court considers:
(a) a United States court of appeals has ... so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; ...